No. 10,690

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CLINTON B. McELHENY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The facts in this case are as follows:

The appellant had been a Government employee at San Diego in the year 1929, was transferred to the Sacramento Air Depot, McClellan Field in 1939 and remained at the latter place from 1939 until November 25, 1943. When first transferred to McClellan Field he was employed as a mechanic supervisor. On April 6, 1942 he was appointed group superintendent of the Maintenance Group. On September 1, 1942 he was

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(NOTE): All references herein are to Reporter's Transcript, except as otherwise noted.

made general foreman of Aircraft Shops, and on October 13, 1942 he was made assistant superintendent of Aircraft Shops, which position he held until the termination of his employment on November 25, 1943. It should also be pointed out that appellant testified that he had charge of the "whole Maintenance Division at McClellan Air Field and that that Division covered an area of some 15 to 20 acres". (T. p. 107, lines 17-20.)

Thereafter, on the 7th day of January, 1944, appellant was indicted by the Federal Grand Jury of the Northern Division, Northern District of California, at Sacramento, in an indictment containing six counts. However, the appellant was only found guilty and sentenced on the first count of the indictment, which charged him with theft of Government property from McClellan Field, and we will not reiterate that count of the indictment as it is set out in full on page 2, et seq., of the Printed Transcript of Record. Therefore, we will confine ourselves throughout this brief to evidence in respect to the first count of the indictment. A brief summary of the evidence is as follows:

The first witness called in behalf of the Government was Mr. Arthur Chandler, Investigator for the Air Service Command with headquarters at the Sacramento Air Depot, McClellan Field, California, who testified that he had a conversation with the appellant on the 23rd day of November, 1943, in the presence of Captain Ark, Sergeant Hubbs and Andrew Cecchettini, in regard to certain Government property; that the appellant at that time advised the witness that he had taken to his home property that belonged to the

United States Government, and that he would be willing to take the investigator to his home for the purpose of determining what property in his home belonged to the Government, and that he would turn over to the investigator all property that belonged to the Government. (T. p. 3, lines 8-24.) Mr. Chandler accompanied the appellant to the latter's home and together they made an examination of a box of tools found in a bedroom of the house, and also of some tools found in a barn and house trailer in the rear of appellant's home. The tools so found on appellant's premises were in Court at the time of the trial and Witness Chandler identified such tools as having come from the appellant's premises under the circumstances hereinabove set forth. (T. pp. 4, 5, 6.)

The appellant also stated to Mr. Chandler that he had disposed of other Government property, such as tools and equipment, by throwing them down a well, and he took Mr. Chandler to the well and he, Chandler, could actually see the Government property on the bottom of the well, which was approximately 80 feet in depth.

The appellant also stated to Chandler that the reason he had thrown the Government property down the well was that he had become frantic and scared. (T. pp. 125-127.)

Warren Wilford Parker was next called by the Government. He testified that he was Supervisor in Charge of Tool Issue at McClellan Field, that he had been employed in that capacity for the past five years. This witness specifically identified a number of articles

set forth in the first count of the indictment, as follows: A 10″ steel wrench (T. p. 10) which bore marks "U.S. Army". This is the wrench set forth in the indictment. (p. 8 of the Printed Transcript of Record.) He testified that the padlock which was introduced as Government's Exhibit No. 3, which bears the number "155", was similar to the padlocks used at McClellan Field and bore the same number as the padlocks used at McClellan Field. (T. p. 12, lines 2-9.) Witness Parker next identified Government Exhibit No. 4, "machinist's double point nine inch scriber", by the marks "U.S.A." upon it. This item is set forth in the indictment at page 6 of the Printed Transcript of Record. This witness likewise identified a pair of pliers marked "U.S." (Gov. Ex. No. 5), as coming from McClellan Field. (T. p. 13, lines 13-23.) He identified a steel tape (Gov. Ex. No. 6), marked "Air Corps, U.S. Army", as coming from McClellan Field. (T. p. 14, lines 3-10.) He further identified an 8″ steel wrench marked "U.S.A." as coming from McClellan Field. (T. p. 14, lines 16-23; Gov. Ex. No. 7.) This witness identified a second pair of pliers by the mark "U.S." and identified such pliers as coming from McClellan Field. (T. p. 15, lines 3-18; Gov. Ex. No. 8.)

The foregoing tools and items are described in the indictment as it appears at page 6 of the Printed Transcript of Record.

The witness then identified a paper bag containing tools, all of which bore marks "U.S.A.", and stated that they were similar to tools so marked at McClellan Field, and these were the same tools that Wit-

ness Chandler identified as having taken from the appellant's home on November 23, 1943. (The paper bag of tools was marked Government's Exhibit No. 9 and testimony concerning it appear in T. p. 15, commencing at line 10 and ending at p. 16, line 22.)

This same witness further identified a box of tools and equipment which he stated he had examined and which he could identify as being similar to tools and equipment in stock as Government property at McClellan Field. (T. p. 16, line 3, and p. 17, line 19.)

The next witness called was Max V. Hubbs, a Sergeant at McClellan Field, attached to the Intelligence Department of the United States Air Forces. He testified that at the direction of Captain Ark he prepared a statement in longhand given to the Captain by the appellant, and that he, the witness, had written it up, and that the appellant read it and signed it "Clinton B. McElheny". The statement (Gov. Ex. No. 10), reflects the appellant's admission that the articles recovered by Mr. Chandler at appellant's home on November 23, 1943 were articles of Government property, and in addition to the articles recovered, the appellant in the statement sets forth a list of articles and equipment which he stated he disposed of on November 21, 1943. The articles disposed of by the appellant were the articles which were shown to Mr. Chandler at the bottom of the well. The statement further sets forth some articles which the appellant says were given to him on a pass to be taken from McClellan Field. (T. pp. 31-32.)

The importance of appellant's statement in respect to articles given or issued to him on a pass to be taken from McClellan Field will be developed in the argument to follow in relation to that portion of appellant's defense respecting his purported authority to take the articles listed in the indictment from McClellan Field.

The next witness called was Walter E. Moehle, Special Agent of the Federal Bureau of Investigation, who testified that he, after learning of the alleged theft of property by the appellant from McClellan Field, invited the appellant to come to his office in the Post Office Building at Sacramento, California. The appellant called at Mr. Moehle's office in the afternoon of November 29, 1943, and at that time gave a statement to Mr. Moehle, which was as follows:

> "I, Clinton B. McElheny, make this statement to Walter E. Moehle, whom I know to be a special agent of the Federal Bureau of Investigation. I have been advised I need not make this statement; and no threats or promises have been made to me. I know it may be used in court.
>
> "I have been a civilian employee of the War Department since 1929. I came to the Sacramento Air Depot in 1938 when Rockwell Field, San Diego, was moved to Sacramento, California. I was assistant general superintendent of the Maintenance Division. On or about December 15, 1941, or January 1942 I removed from the Sacramento Air Depot the items listed below and listed on the sheet identified as List Number 1, Pages 1, 2, 3 and 4. Since about January 1942 I have removed small items, as an occasional nut, bolt, screw and so forth.

"50 taps, hand; 75 drills (large and small of various sizes); 25 files; 25 reamers.

"Most of these items were in various boxes at Sacramento Air Depot and were materials charged out to me.

"I knew these items were property of the United States Government and I knew I should not have them in my possession; and was violating a federal law in so doing.

"I have read the above statement and say it is true."

Signed: "Clinton B. McElheny."

"Witnessed by: Walter E. Moehle, Special Agent, F.B.I., Sacramento, Calif., 11/29/43; Robert E. Goeke, Special Agent, F.B.I., Sacramento, Calif., 11/29/43."

(T. pp. 41, 42; Gov. Ex. No. 11.)

It should be noted that the list of articles which is attached to the statement set out above, and which is a part of Government's Exhibit No. 11, is identical with the tools which the Government alleges were stolen by the appellant from McClellan Field, and which tools and equipment were introduced into evidence as Exhibits 2 to 9, inclusive, and Exhibit 12.

Following the introduction of the statement above referred to the box of tools previously marked Government's Exhibit No. 1, identified by Witnesses Chandler and Parker, was offered in evidence as Government's Exhibit No. 12.

Whereupon appellee rested.

The appellant, McElheny, testified that he recalled throwing United States Government property down a well, and that he showed Mr. Chandler where he had thrown it.

POSITION OF THE GOVERNMENT.

It is the contention of the Government that the evidence in this case is sufficient in all respects to uphold the verdict of guilty, and, furthermore, that no confessions or admissions obtained from the appellant were in violation of the doctrine announced in the recent case of *McNab v. United States,* 318 U.S. 332, 63 S.Ct. 608.

ARGUMENT.

Appellant in his brief sets forth some twenty-seven ASSIGNMENTS OF ERROR, of which Assignments 1 to 8, inclusive, and 11, relate to the admission in evidence of certain physical exhibits, namely, tools and equipment.

ASSIGNMENTS OF ERROR NOS. 1 to 7, inclusive, refer to U. S. Exhibits numbers 2 to 8, inclusive, which consist of wrenches, padlocks, machinist's scriber, pliers and steel tape. Appellant advances the objection that none of these exhibits were identified as having been at McClellan Field, and that no witness produced by the Government could identify them as property of the United States.

It is the Government's contention that the exhibits were amply identified in the following manner: (1) by Witness Parker, who testified concerning the marks "U.S.A.", etc.; (2) by the Witness Chandler, who found them at the appellant's home or premises; (3) by the appellant himself, who informed Chandler that they were Government property taken from McClellan Field, and his further statement to Special Agent Moehle of the Federal Bureau of Investigation, wherein the appellant again reiterated the Government ownership and taking from McClellan Field.

ASSIGNMENT OF ERROR NO. 11 also refers to a box of tools in evidence as Government's Exhibit No. 12, and again appellant argues that there was no identification of the contents of the box. This exhibit contained numerous small items and it was not attempted at the trial to specifically identify each and every tool or article contained in the box. However, the witnesses Chandler and Parker both were familiar with the contents of the box, and again Chandler testified that such contents were taken from the appellant's home or premises and that he, the appellant, had informed Chandler that all the articles therein were Government property and had been taken by him from McClellan Field. Again, as in the case of Government's Exhibits numbered 2 to 9, inclusive, the appellant further stated to Special Agent Moehle of the F.B.I., that such articles were Government property taken by him from McClellan Field and that he knew the items in question were property of the United States Government, and that he knew he should not

have them in his possession, and was violating Federal law in so doing.

Appellant at page 12 of his brief cites the well established rule that possession of stolen goods, standing alone, is insufficient as *prima facie* evidence of guilt of theft. But the evidence here goes far beyond the mere possession. The possession here involves a distinct and conscious assertion by the appellant of his knowledge that they were property of the United States Government, that he took them from McClellan Field, and that he knew he was violating Federal law to so do.

In ASSIGNMENT OF ERROR NO. 8 appellant complains of the admission of U. S. Exhibit No. 9, a miscellaneous lot of tools, and characterizes this exhibit as "a lot of worn and rusted wrenches, files, and a hodge podge of odds and ends such as found around the home shop of any machinist". We submit to this Honorable Court that there is no evidence to support the appellant's characterization—in fact, it is distinctly to the contrary, as reflected by appellant's own testimony and the exhibits which are in evidence.

In ASSIGNMENT OF ERROR NO. 9 appellant complains of the admission of Government's Exhibit No. 10, which is the statement of the appellant identified by the witness, Sergeant Hubbs, on the ground it was hearsay and was an extra-judicial confession obtained by trick and ruse.

Obviously, it was not hearsay, because it was a statement made by the appellant. The appellant in his

statement that the statement was obtained by trick, artifice and fraud, is apparently contending that the trick, artifice and fraud, were an attempt to convey to the appellant the idea that he was being court martialed.

The Twenty-fourth Article of War provides as follows:

> "No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, or before an officer conducting an investigation, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him, or to answer any question not material to the issue when such answer might tend to degrade him."
>
> T. 10 USCA, Sec. 1495.

As Sergeant Hubbs testified, the military authorities were simply conducting an investigation, and in so doing were informing the appellant of his rights under the Twenty-fourth Article of War, which article relates not only to military courts, but also to military officers conducting investigations.

ASSIGNMENT OF ERROR NO. 10 attacks the admission of Government's Exhibit No. 11, which is the second statement obtained from the appellant by a Federal Bureau of Investigation Agent.

Appellant in his brief at page 10 said he was not under arrest, although he was advised and informed that he was. There is nothing in the record to indicate that at the time the appellant voluntarily appeared at the Federal Bureau of Investigation office he was either under arrest or had ever been advised that he was, and there is no evidence of any duress being exerted by the Federal Bureau of Investigation to obtain the statement from the appellant. Title 5, USCA 300(a), requires that a person arrested shall be immediately taken before a committing officer, but in the instant case, at the time of appellant's visit to the Federal Bureau of Investigation office he was not under arrest and was not under any compulsion to either go to that office or to make any statement after he arrived there. As a matter of fact, he went there voluntarily, simply upon the oral request of the agent. So far as the appellant's contention that the burden is upon the prosecution to prove the confession was voluntary, assuming, without admitting that to be the law, the Government in this case actually did prove that the statement was voluntary, as the appellant stated in his statement as follows:

> "I have been advised I need not make this statement, and no threats or promises have been made to me. I know it may be used in court."

As to ASSIGNMENT OF ERROR NO. 12, it is appellant's contention the Court erred in sustaining objections of the Government to the attempt by appellant to show the method and means provided by the Field to return tools upon transfer to another position

on the Field. We are at a loss to understand how this evidence would be competent, or material, or relevant in any way whatsoever. The sole issue before the Court was whether or not the appellant had stolen the articles in question from McClellan Field.

As we have pointed before, the appellant had already admitted taking the articles from the Field, had admitted that he knew it was against Federal law to take the articles in question from the Field. Undoubtedly there are rules and regulations by which tools can be transferred from the person to whom they are issued back into the tool room at the Field. However, the appellant has never contended that the evidence he offered would tend to prove that appellant had the right to remove the tools in question in this case from the Field to his home for personal use. Therefore, we submit that the objection was well taken.

In ASSIGNMENT OF ERROR NO. 13 the appellant contends that it was error by the Court to sustain an objection to the introduction of evidence of the demand of McClellan Field against appellant in the sum of $61.24 to cover value of lost tools, which demand appellant received through the mails.

It is to be noted in this regard that the letter the appellant attempted to offer in evidence was dated January 4, 1944, a month and a half after appellant's discharge from McClellan Field. We submit that this letter would have no bearing upon the guilt or innocence of the appellant as to the charge against him in this case, that is, as to whether or not he had stolen

the tools in question from McClellan Field. Assuming, without conceding, that some of the tools in question came into appellant's hands lawfully for use at McClellan Field, the appellant does not prove by this evidence that appellant had the right to remove those tools to his home for his own personal use.

In this Assignment of Error the appellant also states:

> "Apparently the indictment itself was taken as sufficient evidence of the guilt of appellant and no further testimony or evidence was required."

Such a statement is, of course, absurd. The Government introduced testimony by witnesses Chandler and Parker that the property in question was property of the United States Government. Second, the Government actually introduced the physical evidence, to-wit, a number of tools marked "U.S.A.", "U.S.A. Air Corps", etc. Third, the Government showed that appellant had access to this property at McClellan Field. Fourth, the Government showed that the articles in question were found at appellant's home. Fifth, the Government showed that appellant on at least three separate occasions stated that he had taken the articles in question from McClellan Field and that he knew it was against Federal law to do so.

In ASSIGNMENT OF ERROR NO. 14 appellant contends that the Court erred in sustaining objections to introduction in evidence of 12 memorandum receipts. We submit that the Court was correct in its ruling as the receipts would not under any stretch of

the imagination prove, or tend to prove, whether or not the appellant stole the tools in question from McClellan Field.

ASSIGNMENT OF ERROR NO. 15 is practically identical with Assignment of Error No. 14, except that it relates to a voucher issued at McClellan Field to appellant either in December, 1943, or January, 1944, showing payment of $52.92 by appellant for tools. It is obvious that this voucher could have no bearing upon the guilt or innocence of the appellant in this case as the voucher was issued, according to the appellant, in December, 1943, or January, 1944, which was subsequent to the date of the offense charged in the indictment. Further, all that could possibly be shown by the voucher under any circumstances would be that appellant, according to his contention, paid $52.92 to McClellan Field for tools, and there is no contention by the appellant that this payment could be connected in any way with the tools in question in the indictment in this case.

ASSIGNMENT OF ERROR NO. 16—the appellant contends the Court erred in sustaining objection to testimony of the appellant as to a conversation had with a Captain Pierce the day following the date of the statement given by appellant on November 24, 1943 to officers at McClellan Field. It should be noted that any such testimony by the appellant would be a self-serving declaration, as the conversation occurred, according to appellant's contention, the day after appellant gave this statement or confession. It fur-

ther can be noted that appellant did not call Captain Pierce as a witness in his behalf. At any event, it is clear that what was said by the appellant or Captain Pierce the day following the taking of the statement could not in any way tend to show whether or not the statement was obtained by "third-degree methods" as the appellant does not contend that Captain Pierce was present at the time the statement was given.

ASSIGNMENT OF ERROR NO. 17 refers to the Court's ruling in striking out the testimony of appellant regarding being in custody of Mr. Chandler. It should be noted that the Court, of course, allowed the appellant to state all the facts and circumstances surrounding the entire transaction involved in this case and it is clear that when the appellant attempted to testify that he was in custody of Mr. Chandler it was a conclusion and was properly objectionable.

ASSIGNMENT OF ERROR NO. 18 relates to the Court's ruling sustaining the objection to the introduction in evidence pass for tools which were not mentioned in the indictment and could not possibly have any bearing upon the guilt or innocence of the appellant as charged in the indictment. It is, of course, not the Government's position that under certain conditions tools, trucks, airplanes, etc., cannot be removed from McClellan Field. However, it is the contention of the Government in this case that the appellant had no right to remove from McClellan Field the tools mentioned in the indictment in this case, and we have, of course, limited ourselves to that contention, and we submit that the Court was correct

in sustaining the objection of the Government in this case.

ASSIGNMENT OF ERROR NO. 19 is practically identical in substance with Assignment of Error No. 18, and we submit the Court was correct in its ruling in sustaining the objection to the offered testimony of Witness Dudley.

ASSIGNMENTS OF ERROR NOS. 20, 21, 22, 23 and 24 are also identical with Assignments of Error Nos. 18 and 19, and we will not further discuss the matter.

ASSIGNMENT OF ERROR NO. 25 relates to appellant's contention that the Court erred in rejecting the offer of proof of appellant "to show that a foreman issuing tools to workmen would find himself with two of the same kind, as one workman would turn in the bit of a drill and another the shank and be reissued two drills. When the workmen quit or were transferred, the foreman would have two drills, was charged with one, and he could never return the other." We submit the Court did not err in rejecting this offer of proof as it is apparent it could not possibly have any bearing upon the guilt or innocence of the appellant.

ASSIGNMENT OF ERROR NO. 26 alleges that the Court erred in finding the appellant guilty of the first count of the indictment, that of theft, while finding him not guilty of possession on the remaining five counts of possession. We submit that the evidence was sufficient on which to find the appellant guilty of hav-

ing stolen the property in question from McClellan Field. As we have pointed out before, the property in question in the indictment in this case was, first, Government property, second, was found in appellant's possession at his home, third, that appellant admitted it was Government property, fourth, admitted he had taken the articles in question from McClellan Field, and fifth, appellant knew that it was wrong to do so and against the Federal statutes.

We further submit that the Court was also correct in finding the appellant was not guilty on the possession counts, for this reason: Section 101 of Title 18 USCA provides:

> "RECEIVING STOLEN PUBLIC PROPERTY. Whoever shall receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, which has theretofore been embezzled, stolen, or purloined by any other person, knowing the same to have been so embezzled, stolen, or purloined, shall be fined not more than $5,000, or imprisoned not more than five years, or both; and any such person may be tried either before or after the conviction of the principal offender."

It is to be noted that it is only illegal for one who has obtained stolen property from "any other person" to have it in his possession. The evidence in this case was all to the effect that the appellant did not obtain the property from another person who had stolen the

property, but that he, himself, stole the property and removed it from McClellan Field.

In ASSIGNMENT OF ERROR NO. 27 the appellant makes no comment, therefore, neither will we.

CONCLUSION.

We submit that the record in this case establishes beyond any reasonable doubt that the property in question was Government property, (2) that it was removed from McClellan Air Field by the appellant; (3) that appellant converted the same to his own use and actually had it at his home; (4) that appellant knew it was wrong as he actually disposed of a box of tools taken from the Field down a well, and stated in his statement to Special Agent Moehle of the Federal Bureau of Investigation that he knew it was against Federal law to remove the property from McClellan Field.

We further submit that there is no evidence whatsoever in the record that even indicates that any force, duress, or promises of immunity were used by the Government in order to obtain the statement in question from the appellant. Rather, the record is clear that the appellant, as a matter of fact, was not arrested until after he had given his statement to Mr. Moehle on November 29, 1943, and that up until that time all the actions of the appellant had been voluntary.

We wish also to point out to the Court that appellant did not take an exception to a ruling of the Court during the entire course of the trial. Of course, while it is true that the Court may take notice of plain error in the record, no such plain error has been alleged by the appellant, and we respectfully submit that on this ground alone the Court should affirm the judgment of the Trial Court.

Dated, Sacramento, California,
June 14, 1944.

Respectfully submitted,

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